In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1723

JESUS ALVAREZ-FRANCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that when the district judge imposed sentence here, he improperly relied on the fact that petitioner had committed perjury during trial.

Following a jury-waived trial in the United States District Court for the Eastern District of California, petitioner was convicted on both counts of an indictment which charged him with having knowingly made false statements in connection with the purchase of a handgun, in violation of 18 U.S.C. 911 and 922(a)(6). He was sentenced to consecutive maximum prison terms on each count (five years and three years); all but six months of the entire sentence was suspended, and petitioner was placed on probation on the condition that he be deported. The court of appeals affirmed the conviction *per curiam*, but found the sentence improper insofar as it related to deportation and remanded the case for resentencing. This Court denied certiorari (409 U.S. 980).

On December 18, 1972, prior to resentencing, the district judge, who had presided over the trial, denied petitioner's affidavit of bias and prejudice, under 28 U.S.C. 144, and imposed the same sentence as originally imposed, with the exception of the deportation order. The court of appeals affirmed on May 16, 1973 (Pet. App.). The petition for a writ of certiorari was not filed until June 20, 1973, and is out of time under Rule 22(2) of the Rules of this Court. There is in any event no reason to grant the writ.

Petitioner's defense at trial had been that his false statements were not knowingly made, because he did not understand the questions asked by the dealer to obtain the information necessary to complete the official firearm application forms. In an effort to elicit the extent of petitioner's command and understanding of the English language, the trial judge in this non-jury case engaged in a brief colloquy with petitioner during his testimony. Partly on the basis of this colloquy, the judge found him guilty, indicating disbelief in petitioner's statements that he did not comprehend English.

Petitioner's sole claim here is that the district court judge improperly considered petitioner's veracity during trial to determine the sentence imposed. This claim is unsupported by the record. The district court did not state at the time of sentencing that he was in fact taking petitioner's perjurious conduct into consideration. The only statement cited by petitioner is the district court's finding—in announcing his verdict—that petitioner had "neither been frank with the Court nor truthful," and that petitioner was "guilty of both of the crimes that are set forth in the indictment" (Pet. 7). These were clearly proper findings in a non-jury case. See Fed.R.Crim.P., Rule 23(c). Moreover, the trial judge's statements at that time, that he was "outraged by people who commit per-

jury," but was "not at all certain that * * * [petitioner] hasn't committed perjury in this case" and "that it is a case that is *not* worthy of examination by the grand jury to determine whether or not this defendant has committed perjury" (Pet. 7), hardly establish that the district judge, in imposing what amounts to a six month sentence, considered petitioner's false testimony during trial.

This case is, therefore, distinguishable from *Scott* v. *United States*, 419 F. 2d 264 (C.A.D.C.), upon which petitioner relies. In *Scott* the court of appeals held that resentencing was necessary where the trial judge indicated at sentencing that he was "in fact impos[ing] additional punishment upon the appellant for the supposed commission of perjury" (*id.* at 269) instead of requiring the government to prosecute for perjury. Here, the district judge made no comparable statement. Compare *United States* v. *Isaac*, 449 F. 2d 1040, 1044 (C.A.D.C.) (dissenting opinion of Bazelon, J.).[1] While we believe, contrary to the holding in *Scott*, that the sentencing judge could properly have considered petitioner's patently false testimony at trial, this clearly is not the case in which to resolve any alleged conflict among the courts of appeals.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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[1]In *United States* v. *Isaac*, *supra*, the Court of Appeals for the District of Columbia Circuit, over the dissent of Chief Judge Bazelon, who wrote the opinion in *Scott*, declined to extend the *Scott* holding to a factual setting not unlike the instant case.

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